IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO.1539 OF 1986

Bank of Maharashtra, a Banking company formed and established under the Banking Companies (Acquisition & Transfer of Undertaking) Act V of 1970 having its Head Office at 'Lokmangal', 1501, Shivajinagar, Pune 411 005 and a branch office inter alia at 45/47, Bombay Samachar Marg, Fort, Bombay 400 023. ...Plaintiff

Versus

1. M/s.Lit-Lite Industries a partnership firm, carrying on business at 82-D,Shariff Building, Kala Killa, Dharavi Road, Bombay 400 017.

2. Bajirao Jogan Pakhare, of Bombay Indian Inhabitant, residing at B-50, Government Colony, 2nd Floor, Bandra (East), Bombay 400 050

3. Deshraj Jogan Pakhare, of Bombay Indian Inhabitant, residing at 82-D, Shariff Building, Kala Killa, Dharavi Road, Bombay 400 017

4. Dattatray Jogan Pakhare, of Bombay Indian Inhabitant residing at A/3, Navshilpwani Co-operative Housing Society Ltd, Lallubhai Park Road Extension, Vile Parle (W), Bombay 400 056. ...Defendants

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Shri Ghanekar i/by M/s.Ghanekar & Co for the Plaintiff.
None for the Defendants.

CORAM : ABHAY S.OKA, J.
DATED : JULY 27, 2007.

JUDGMENT:

1. I have heard the submissions of the learned counsel for the Plaintiff. The Plaintiff has filed this suit for recovery of amounts due and payable under various credit facilities granted by the Plaintiff Bank in favour of the first Defendant. The first Defendant is a partnership firm of which the second and third Defendants are the partners. The fourth Defendant had guaranteed repayment of loan by the first Defendant. On the request made by the first to third Defendants, the Plaintiff sanctioned a packing credit facility in the sum of Rs.1,00,000/- in favour of the first to third Defendants. The said facility was pertaining to the exports to be made by the said Defendants. The first to third Defendants were also granted FOBN facility in the sum of Rs.50,000/- on the basis of the bills drawn by the said Defendants on their foreign buyers and a cash credit facility of Rs.15,000/-.

2. The packing credit facility was granted on 24th June, 1977 against the execution of various documents and subject to terms and conditions incorporated therein. The first to third Defendants executed the various documents by way of security for FOBN facility. As stated earlier the fourth Defendant executed the necessary documents as a guarantor.

3. According to the case of the Plaintiff the

Defendants failed and neglected to liquidate the dues payable under the said facilities. Therefore, a notice of demand dated 25th October, 1985 was addressed to the Defendants by the Plaintiff. Though the notice of demand was served there was no response from the Defendants and therefore, the present suit has been filed.

4. A written statement has been filed by the Defendants. A contention raised in the written statement is that the suit having been filed beyond the period of limitation is barred by law of limitation. The second contention raised without prejudice to the earlier contention is that a purchaser of clothes at London did not clear the goods and therefore the Plaintiff filed a suit against the said purchaser at London and a recovered part of the price of the said goods. It is alleged that the Defendants are not sure whether the Plaintiff has given credit of the said amount to the said Defendants. The second contention is that as a result of fire in the year 1976 in the neighbouring factory of the factory, the first Defendant’s goods worth Rs.3 crores were damaged. According to the case of the Defendants a claim was lodged by the Plaintiff in respect of damaged goods and the same was recovered from the insurance company. It is contented that the Plaintiff has not disclosed whether any credit has

been given for the amount received from the insurance company. It is also alleged that though the Plaintiff sold the hypothecated goods belonging to the first Defendant, the same were not sold immediately and were not stored carefully by the Plaintiff. It is contended that due to the said default, the Plaintiff could not realise the best price. In paragraph No.3 of the written statement it is contended that the Defendants are not aware whether due credit has been given by the Plaintiff for the various amounts realised by the Plaintiff from the third parties. Therefore, a contention has been raised that the Defendants are entitled to credit of the said amounts. It is contended that the hypothecated goods of the first Defendant could have secured more price but for the negligence of the Plaintiff. It is therefore, specifically pleaded that the Defendants are entitled to claim a set off to the extent of Rs.2,50,000/- because of the negligence on the part of the Plaintiff. The Defendants denied averments made in various paragraphs of the plaint. It was contended that the fourth Defendant stands discharged from his obligation as a guarantor.

5. Following issues were settled on 11th July, 2005:

(1) Whether the Plaintiffs prove that under the Packing Credit Facility the Plaintiffs are

entitled for the decree against Defendants for the sum of Rs.1,11,309.76 as stated in particulars of claim, which is annexed and marked as Exhibit G to the plaint together with interest thereon at the rate of 14% p.a. with quarterly rest from the date of the suit till payment and realization as prayed in prayer (a) to the plaint?

(2) Whether the Plaintiffs prove that under the Foreign Outward Bills for Negotiation Facility, the Plaintiffs are entitled for the decree against Defendants for the sum of RS.81,511.15 as stated in particulars of claim, which is annexed and marked as Exhibit H to the plaint together with interest thereon at the rate of 14% p.a with quarterly rest from the date of the suit till payment and realization as prayed in prayer (b) to the plaint?

(3) Whether the Plaintiffs prove that under the Cash Credit Facility the Plaintiffs are entitled for the decree against Defendants for the sum of rS.1,91,902.85 as stated in particulars of claim, which is annexed and marked as Exhibit I to the plaint together with interest thereon at the rate of 14%

p.a with quarterly rest from the date of the suit till payment and realization as prayed in prayer (c) to the plaint?

(4) Whether the Defendants proves that the suit is barred by the law of limitation as stated in para 1 of the written statement?

(5) Whether the Defendants prove that the Defendants are entitled to claim a set-off to the extent of Rs.25,000/- as stated in paragraph 9 of the written statement?

(6) Whether the Defendant No.4 prove that he is discharged from his obligation under the guarantee, as stated in paragraph 10 of the written statement?

6. The Plaintiff led evidence of one Mr T.R.Joy a Chief Manager of the Plaintiff' branch at Fort Branch, Mumbai. The Plaintiff has relied upon various documents. The said witness was cross-examined by the learned counsel appearing for the third Defendant. It appears that after the cross-examination by the third Defendant was completed, the Defendants did not appear before this Court. When the suit appeared before this Court on 20th July, 2006, 25th April, 2007 and on 16th June, 2007, none appeared for the Defendants. Infact

on 16th June, 2007 this Court passed an order directing the Plaintiff to file written submissions and synopsis. Even before this Court when the suit appeared for hearing of arguments, none of the Defendants have appeared. There is no evidence led by the Defendants.

7. The learned counsel appearing for the Plaintiff has invited my attention to the evidence of the witness examined by the Appellant. He pointed out that apart from various documents which are proved by the said witness of the Plaintiff, the third Defendant has asked questions on the basis of letter dated 01st February, 1991 sent by the second and third Defendants to the Plaintiff and the said questions show that the execution and the contents of the said letter were admitted by the concerned Defendants. He, therefore, submitted that in the said letter there is a clear admission of the liability by the second and third Defendants. He submitted that the Defendants have not led any evidence to substantiate their case and therefore the suit must be decreed.

8. In respect of packing credit facility in the sum of Rs.01,00,000/- the Plaintiff is relying upon following original documents executed by the second and third Defendants which are produced before this Court:

SR.NO.	PARTICULARS	DATE
1	On Demand Promissory	24.06.1977
2	Letter of continuing security	24.06.1977
3	Letter of Undertaking	24.06.1977
4	Deed of Hypothecation	24.06.1977
5	Letter of confirmation-cum- acknowledgment	07.01.1980
6	Letter of confirmation-cum-acknowledgment	11.11.1982

The Plaintiff has relied upon following documents executed by the second and third Defendants documents pertaining to the grant of FOBN facility: pertaining

SR.NO.	PARTICULARS	DATE
1	On Demand Promissory Note of Rs.50,000/-.	24.06.1977

2	Letter of continuing security for Rs.50,000/-	24.06.1977

In respect of the same facility the Plaintiff has relied upon another set of three documents executed by the same Defendants which are produced in original which are as under:

SR.NO.	PARTICULARS	DATE
1	Letter of Agreement	24.06.1977
2	Letter of balance Confirmation	07.01.1980
3	Letter of confirmation-cum-acknowledgment	11.11.1982

In so far as cash credit facility is concerned, the Plaintiff is relying upon the four documents executed by the second and third Defendants which are produced in original. The said documents are as under:

SR.NO.	PARTICULARS	DATE

1	On Demand Promissory Note of Rs.15,000/-	24.06.1977
2	Letter of continuing security Rs.15,000/-	24.06.1977
3	Deed of Hypothecation	24.06.1977
4	Letter of confirmation-cum-acknowledgment of Rs.90,478,82/-	07.01.1980
5	Letter of confirmation-cum-acknowledgment of Rs.01,08,246.81/-	11.11.1982

9. Apart from these documents, the Plaintiff has produced a copy of ledger of the packing credit account, a statement of account of FOBN facility and copy of ledger of the cash credit account. In the re-examination of the said witness of the Plaintiff Bank, the said three documents have been proved by the witness by stating that the said copies are true copies. Witness identified the signatures of the officer of the Plaintiff Bank on the said three copies. Apart from the said documents, the Plaintiff produced the letter dated 02nd November, 1985

allegedly sent by the second Defendant on behalf of the first Defendant and a letter dated 01st February, 1991 allegedly sent by the second and third Defendants.

10. It must be noted here that while true copies of ledger of packing credit account and cash credit account and a statement of account of FOBN facility were tendered on record during the recording of further examination in chief, no objection was raised for exhibiting the said documents and the objection raised was confined only to the documents being taken on record. In the further examination in chief the said three documents have been duly proved by the witness.

11. It must be noted here that in so far as other documents except letter dated 01st February, 1991 are concerned, the witness examined by the Plaintiff is unable to prove the execution of the said documents. Thus, apart from the true copies of the ledger extracts and true copy of the statement of account relating to three facilities, none of the documents allegedly executed by the first to third Defendants save and except letters dated 02nd November, 1985 and 01st February, 1991 could be proved by the Plaintiff.

12. In the plaint it is alleged that the fourth

Defendant is a co-obligant or guarantor. Even assuming that the documents which are tendered by the Plaintiffs are proved, perusal of the said documents shows that none of the said documents are signed by the fourth Defendant. In so far as the fourth Defendant is concerned, I find that no evidence has been led by the Plaintiff to establish the liability of the fourth Defendant.

13. It will be necessary to refer to the averments made in the written statement. In so far as hypothecated goods are concerned a specific stand has been taken by the Defendants that goods worth Rs.3 lakhs were damaged in fire and Plaintiff has recovered certain amount from insurance company. There is also a contention raised that certain hypothecated goods were sold. It is contended that due to negligence on the part of the Plaintiff proper price could not be realised. It is stated that so far as packing credit facility is concerned the purchaser of the first Defendant at London did not clear certain goods and the Plaintiff by filing a suit has recovered the price of the said goods. Infact, in paragraph No.9 Defendants have claimed set off in the sum of Rs.2,50,000/-. It will be necessary to refer to cross-examination by the counsel for the third Defendant. In the cross-examination, question No.67 asked to the said witness by the counsel for the third

Defendant reads thus:

> "Qn.67 Can you tell us the details regarding the insurance claim filed by the Plaintiff Bank and the amount recovered as referred to in the said letter dated 01.02.1991?

The answer given to the said question reads thus:

> "Ans. I am unaware of the details of the policy. However, I can only state that the insurance company paid Rs.28,774.25 to the Plaintiff Bank and the same has been adjusted in the account."

The said letter dated 01st February, 1991 was produced by the witness of the Plaintiff in response to question No.65 which reads thus:

> "Qn.65 On what basis you make the said statement and have you produced any document to show that the Plaintiff has given credit to the Defendant No.1?

The answer to question No.65 reads as under:

"Ans. I have produced a letter dated 01.02.1991 which is tentatively marked as Exhibit Y-21 addressed by the Defendants to the Plaintiff Bank wherein it is recorded on page No.2 para No.4 "as per banks requests we had kept the balance goods in the banks godown and the same were again sold by the bank directly, and recovered the amount and adjusted against our account".

14. After the said letter dated 01st February, 1991 was produced by the Plaintiff in response to question No.65, the question No.67 was asked by the counsel appearing for the third Defendant on the contents of letter dated 01st February, 1991. Thus, the counsel for the third Defendant referred to and relied upon the said letter dated 01st February, 1991 sent by second and third Defendants to the Plaintiffs. In view of this position, the said letter will have to be exhibited and will have to be read in evidence. Perusal of the said letter shows that the same is signed by second and third Defendants. In the said letter there is a categorical admission by the said Defendants of grant of packing credit facility in the sum of Rs.1,00,000/-, FOBN facility in the sum of Rs.50,000/- and cash credit facility of Rs.15,000/- by

the Plaintiff to the said Defendants. In the said letter it is stated that the first Defendant Company was closed. It is stated that the said Defendants lost heavily in the business and as sanction to the said facilities was not granted in time, the said Defendants were put to great hardship. A request is therefore made by the said Defendants for grant of permission to pay the principal amount of Rs.46.232.46/- within a month's time by waiving the interest accrued thereon. In paragraph No.7 of the plaint the Plaintiffs have referred to reply dated 02nd November, 1985 sent by the Defendants to the notice of demand dated 25th October, 1995. Perusal of the written statement and in particular paragraph No.16 thereof shows that the Defendants have not at all denied that they had sent reply dated 02nd November, 1985 to the notice of demand issued by the law officer of the Plaintiffs. Therefore, the reply which has been tentatively marked as "Y-20" will have to be admitted in evidence and the same will have to be read in evidence. In the said reply, the Defendants have come out with a case that in the current year they could not make any payment since there was no business. By the said letter they assured the Plaintiff that entire amount of dues will be paid by the end of March 1987.

15. Thus, the grant of three facilities in favour

of the first to third Defendants has been categorically admitted by the second and third Defendants who are the partners of the first Defendant- Firm. The letter dated 01st February, 1991 also shows that the facilities were availed of and according to the second and third Defendants balance principal amount payable by them under the Packing Credit facility was Rs.46,232.46/-.

16. Apart from what is stated above, the true copies of ledger in respect packing credit account as well as cash credit account were duly proved in evidence (Exhibit Y-22 and Y-24 respectively). A true copy of statement of account of FOBN facility was also duly proved (Exhibit Y-23). The said documents were proved in re-examination of the witness of the Plaintiff on 11th September, 2006. After recording of re-examination the learned Commissioner has recorded that the counsel for the third Defendant sought time to cross-examine the witness for the Plaintiff on the said three documents. However, the Commissioner directed the parties to approach this Court and seek necessary directions whether the cross-examination by the third Defendant can be allowed. After 25th September, 2006 the suit appeared on board on 12th April, 2007 and 16th June, 2007. None of the Defendants appeared before this Court and never sought any direction for permitting cross-examination of the

witness of the Plaintiff. Thus, the three documents marked as "Y-22, Y-23 and Y-24" have not only been duly proved but have gone unchallenged. It must be noted here that in the affidavit of examination-in-chief, and in particular paragraph No.6 it is stated that the Plaintiff has sold certain goods supplied by the Defendant under the FOBN facility and a sum of Rs.11,236.25/- has been recovered by the Plaintiff. It is stated credit for the said amount has been given and after giving credit, balance of Rs.19,570.99/-is shown in the statement of account. Perusal of the said statement of account shows that credit has been given for the said amount on 13th June, 1979. Infact, the claim of the Plaintiff under the FOBN account is in the sum of Rs.19,570.99/-. As stated earlier, no dispute has been raised in respect of documents marked Y-22, Y-23, and Y-24. Thus, the suit claim as against first to third Defendants as per Exhibit G, H AND F has been duly proved by the Plaintiff.

17. As stated earlier the claim against Defendant No.4 has not been established and therefore, to that extent the suit will have to be dismissed.

18. In earlier part of the judgment I have already referred to a reply dated 02nd November, 1985 sent by the first and second Defendants. In the said reply

there is a categorical admission. In the said reply it is stated that "We assure you once again that the entire amount of dues of your bank will be paid by the end of March 1987". This reply is with reference to specific notice of demand. Thus, before filing the suit on 02nd November, 1985 the second Defendant on the behalf of the first Defendant has acknowledged liability of the first Defendant to pay the amount due and payable to the Plaintiffs' bank. The second and third Defendants are liable as partners of the first Defendant. Therefore, the suit filed by the Plaintiff is within the stipulated period of limitation.

19. In so far as prayer made for grant of further interest is concerned, the Plaintiffs have claimed interest at the rate of 14 per cent per annum with quarterly rest. In my view, simple interest at the rate of 14 per cent per annum will have to be awarded.

20. Hence, the issues which are framed are answer as under:

Issue No.1 : Affirmative (Except against the Defendant No.4)

Issue No.2 : Affirmative (Except against the Defendant No.4)

Issue No.3 : Affirmative (Except against the Defendant No.4)

Issue No.4 : In the negative.

Issue No.5 : In the negative as no evidence has been led by the Defendants.

Issue No.6 : In the negative as no evidence has been led by the Plaintiffs.

21. Hence, I pass the following order:

(i) The suit stands decreed as against the first to third Defendants in terms of prayer clauses (a) to (d) and (h).

(ii) The suit stands dismissed as against the fourth Defendant.

(iii) The decree passed in terms of prayer clauses (a) to (c) is with modification that interest payable on the amounts mentioned therein will be at the rate of 14 per cent per annum from the institution of the suit till realisation of payment.

(iv) Certified copy is expedited.

JUDGE